Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 168.

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs.

ELLEN SULLIVAN.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

This is a suit to determine the title to a lot of ground (Lot 8, in Block 30) in the town of Helena, in the Territory of Montana, of which the possession is held by the plaintiff in error, who was the defendant below. Two record titles are sought to be shown; and there are also rival claims of title by adverse possession.

Under the provisions of the act of Congress of March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands" (14 Statutes, 541) the tract of lands now occupied by the town of Helena, in the Territory of Montana, was granted by letters patent of the United States, dated June 16, 1872, to the probate judge

of the county of Lewis and Clarke, within the limits of which the town of Helena is situated, to be held by him and to be disposed of according to law for the use and benefit of the several occupants. (Record, p. 9.)

The probate judge at that time was one Truett. He was succeeded soon afterwards by N. Hilger. (Record, p. 8.) On February 22, 1873, Hilger, as probate judge, conveyed the lot in question to one Tanner, Tanner conveyed to one Lewis, Lewis to a Mrs. Martin, Mrs. Martin to Joshua Armitage, and Armitage to Dunphy, the plaintiff in error. The conveyance from Armitage to Dunphy was on October 4, 1877. (Record, p. 32.) Dunphy went into possession immediately under his deed, and continued thereafter to retain the possession.

It is claimed on the part of the defendant in error that the probate judge Truett, on the 18th day of September, 1869—nearly three years before the property was granted to him—had already conveyed it to a Chinaman by the name of Wau Lee; that Wau Lee conveyed to another Chinaman by the name of Lum Sing; that Lum Sing conveyed to one McCann; and that McCann, on August 2, 1870, conveyed to the defendant in error. (Record, p. 12 to 17.)

The lot was 25 feet by 100, and had on it a log cabin 16 feet by 24, which was used by some Chinamen for a washhouse. The Chinamen, it seems, left in 1871; and except possibly for a very short time by a troup of "pilgrims" there was no actual occupation of it thereafter until it passed into the possession of Armitage, the grantor of the plaintiff in error, at the time of his purchase on January 29, 1875. The plaintiff in error purchased and went into possession on October 4, 1877, and he has since that time continued to occupy the property. These facts seem to be clearly established by the testimony on both sides. (Record, p. 28, 29, 40, 41.)

Agents of defendant in error paid taxes for her for some time (Record, p. 26), and it is said that they collected some rents. (Record p. 21, 27, 29.)

At the trial nineteen instructions were asked by the defendant in errror, and all but one were given. Seventeen prayers for instructions were presented by the plaintiff in error, of which some were given, some refused, and some given with a qualification. Exceptions were reserved to all the rulings. (Record, p. 44 to 55.)

The defendant in error in some way procured special findings from the jury, together with a general verdict in her favor; and two of these special findings are as follows:

"8. Did any one save and except the defendant, Dunphy, enter into the actual, open, notorious, and exclusive possession of said premises adversely to the plaintiff prior to the month of October, A. D. 1877?

"Ans. No."

"18. Who was in the possession of said lot from March, 1874, to March, 1879?

"Ans. Plaintiff from March, 1874, to October 4, 1877; defendant from October 4, 1877, to March, 1879."

Judgment was rendered for the plaintiff below, the defendant in error; and the supreme court of the Territory sustained the judgment on the sole ground that from the special findings of the jury it necessarily resulted that the defendant in error had held adverse possession of the property for the statutory period of limitations in force at the time—that is, three years; and that thereby she had acquired good title.

To reverse this decision the present writ of error has been sued out.

II.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the defendant in error, by her alleged possession from March 4, 1874, to October 4, 1877, had obtained a good possessory title as against the plaintiff in error.

2. The court below erred in holding the alleged record title of the defendant in error was good and sufficient.

3. The court below erred in holding that the claim of record title made by the defendant in error was sufficient whereon to base a good title by adverse possession.

4. The court below erred in refusing to instruct the jury, on the close of the evidence on behalf of the defendant in error, that she was not entitled to recover.

5. The court below erred in admitting in evidence an alleged deed from Pruett, probate judge, to the Chinaman Wau Lee.

6. The court below erred in admitting in evidence an alleged deed from the Chinaman Lum Sing to McCann.

7. The court below erred in admitting proof of an alleged deed from Wau Lee to Lum Sing and of the contents of such deed.

8. The court below erred in instructing the jury, as in the second instruction asked on behalf of the defendant in error, that the probate judge's deed to Wau Lee was good as against the plaintiff in error.

9. The court below erred in ruling, as it virtually did in its qualification of the 13th instruction asked for by the plaintiff in error, that the plaintiff in error could not have acquired a good title by adverse possession except in pursuance of a good record title.

10. The court below erred in refusing to instruct the jury, as requested in the 15th instruction asked for by plaintiff in error, that the adverse possession claimed by the defendant in error must have been continuous for three years.

III.

BRIEF OF ARGUMENT.

1.

There are two principal questions in this case: 1st. Did the defendant in error exhibit by good and sufficient proof a good record title? 2d. Did the defendant in error exhibit a good title by adverse possession?

The supreme court of the Territory passed upon the latter question alone, and held that, as the defendant in error had been shown by the special findings of the jury to have been in exclusive possession from March 4, 1874, to October 4, 1877, she had thereby acquired good title as against the plaintiff in error.

Prior to February 17, 1877, the territorial statute of limitations in regard to real estate was three years; after that date it became five years. (Record, p. 46.)

2.

It does not appear by what authority the special findings of the jury have found a place in the record, or why they were allowed to be rendered at all. The law of the Territority (Codified Statutes of 1879, Sec. 265) provides as follows:

"In an action for the recovery of money only or specific property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues."

It is to be presumed that the jury acted upon their own motion in this case, and not by any direction of the court—for no direction is found in the record; and it is submitted whether under the law the jury have the right to bring in both a general and a special verdict, or whether their authority is not confined to an alternative. At all events it

seems very much like oppression to find generally against a party, and at the same time to find against him all the facts which could militate against the general finding.

3.

The special findings themselves do not commend themselves to the impartial mind as the result of honest judgment in the consideration of disputed testimony.

It is respectfully submitted that no court will respect the verdict of a jury, whether it be general or special, unless it is founded upon testimony. It is, of course, for the jury and not for a court to weigh the weight of testimony. But to sustain the action of a jury there certainly must be *some* testimony.

Now, for the time between January 29, 1875, and October 4, 1877, there is absolutely no testimony whatever of any kind to show occupation of the premises by the defendant in error. On the contrary the testimony on behalf of both parties shows positively and conclusively that Armitage, the grantor of the plaintiff in error, took possession at the time of his purchase, on January 29, 1875, and retained the possession until he transmitted it with the title to the plaintiff in error on October 4, 1877. (Record, p. 27, 28, 40, 41).

Hoyt, the only witness on behalf of the defendant in error who testifies as to this time, and who was specially called for that purpose, says, positively, that he became agent for Mrs. Sullivan in April, 1876; that he was agent only for lot 9, and not for lot 8, and that for more than a year before the commencement of his agency Armitage had been in possession of lot 8. (Record, p. 27, 28). And yet in the face of this testimony, the only testimony whatever on the subject on behalf of the defendant in error, the jury found specially that the defendant in error continued in the occupation and possession of the premises. It would be a travesty of justice to permit such a verdict to stand.

4.

From the preceding statement it necessarily results that the adverse possession of the defendant in error, whatever it was, came to an end when Armitage purchased and occupied the property on January 29, 1875. Unless, therefore, such adverse possession had existed continuously for at least three years before that date—that is, from January 29, 1872—the defendant in error could have acquired no title by adverse possession. And this necessarily brings up the consideration of the validity of her record title; for, unless the title actually passed from Truett, probate judge, in 1869, it did not pass until the conveyance by Hilger, probate judge, on February 22, 1873, and there could have been no valid title by adverse possession before the last-mentioned day. The title held by the probate judge was held in trust for the people, and, of course, no adverse possession could run against it.

Now, as a matter of fact shown in evidence by the defendant in error herself, the title was not granted by the United States until June 16, 1872. (Record, p. 9, 10.) Under no circumstances, therefore, could adverse possession have commenced against any one until June 16, 1872. But this is fatal to the claim of the defendant in error; for, as we have seen, her adverse possession to be valid as a title must have commenced on January 29, 1872.

5.

Was there a good record title in the defendant in error under the deed claimed to have been executed by the probate judge Truett in 1869, or did the title remain in the probate judge until the conveyance by Hilger in 1873?

The probate judge had no title in 1869—he had no title until June 16, 1872, and he could not have conveyed any before June 16, 1872. It is true there is a territorial statute which reads as follows:

"If any person convey any real estate by conveyance purporting to be in fee-simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee; and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance." (Codified Statutes of 1871, sec. 32.)

But it is submitted that this statute can have no application to deeds by an official person in his official capacity, like the probate judge in this instance, holding a title not in fee-simple absolute, but merely as a trustee under the laws of the United States for the people, and to be disposed of and conveyed in accordance with his trust. The statute simply implies a warranty in all deeds in fee-simple absolute, and dispenses with the necessity of expressing such warranty in the deeds. But an official or a trustee cannot warrant either expressly or by implication; and his deed can be nothing more than what it purports to be in this case—a simple quit-claim deed.

So, if the probate judge obtained no title or right to convey before June 16, 1872, his previous deed to the Chinaman Wau Lee (Record, p. 12, 13,) was a nullity, and the whole title of the defendant in error falls with it.

Again, the deed to Wau Lee purports to have been dated on September 18, 1869, and acknowledged on the same day. But the acknowledgment is fatally defective, as it specifies no person as making the acknowledgment. The statute of the Territory on the subject provides:

"The certificate of acknowledgment shall state the fact of acknowledgment, and that the person making the same was personally known to the officer granting the certificate to be the person whose name is subscribed to the conveyance as a party thereto," &c., &c.

A mere blank acknowledgment does not satisfy the demands of this statute; and this alleged deed is therefore inadmissible in evidence.

The deed from Lum Sing to McCann (Record, p. 14, 15(purports to have been executed on September 30, 1869, and to have been acknowledged on the 18th day of September, 1869—the same day on which the previous deed purported to be acknowledged and twelve days before its date. How a deed can be acknowledged before it is executed does not appear, and there is no attempt made to explain the inconsistency. It is submitted that such an acknowledgment is necessarily void, and that such a deed, at least without some explanation of the incongruity, is utterly inadmissible in evidence.

The alleged deed from Wau Lee to Lum Sing, which is sought to be established entirely by parol proof, is stated to have borne date on or about September 25, 1869. (Record, p. 16.) No date of acknowledgment is shown; but it is fair to presume that this was on the same day (Sept. 18, 1869) as that from Lum Sing to McCann, as it would naturally have intervened between the other two deeds. And the fact that the acknowledgments to all these deeds seem to have been grouped together on Sept. 18, 1869, and yet to purport to have been made before different officers, is a very suspicious circumstance that gives countenance to the theory that there was no such person as Wau Lee. And it is a singular fact that they were kept from the record for upwards of eight months.

The supreme court of the Territory attaches great importance to the alleged fact that the deed from McCann was offered in evidence and admitted without objection from the plaintiff in error. This deed was produced on the trial and shown to McCann, when he was a witness on the stand (Record, p. 16, 17, 19); but there is not a particle of testimony from the beginning to the end of the record to show that it was ever offered in evidence. There is no reason to consider it part of the record at all.

6.

There is a further consideration. Was not the alleged deed from Truett, probate judge, to Wau Lee in 1869 an invalid and void instrument? The point was made that, as a Chinaman and an alien, Wau Lee could not take; and the question is now submitted for the determination of this court with a simple suggestion. It is very true that, in general, an alien may take property, but as against the State may not hold it. But is not the distinction due to the fact that all grantees, and indeed all contracting parties, are presumed to be competent until the contrary appears? But if, upon the face of an instrument, there is apparent a disability in any of the parties to become such party to it, then the instrument is void upon its face, and not merely voidable at the interest of the State or any person in interest. It was evidently not the intention of Congress to allow Chinese residents of our country to become occupants and owners of the public lands; and therefore a deed to one under the circumstances of the alleged deed to Wau Lee in this case is of questionable validity. Should it not be treated as a nullity?

7.

It seems to be plain that the defendant in error did not establish a good record title by competent and legal proof. And, if this be so, she is not entitled to succeed either upon her legal title or upon adverse possession; for in that event, as already stated, there could have been no adverse possession before the probate judge Hilger parted with the title on February 23, 1873; and when Hilger validly parted with the title in 1873, the premises being then vacant and unoccupied, the presumption of possession would accompany the valid legal title, and the burden of proof would be upon the defendant in error to show that she had disseized the plaintiff in error. This has not been done.

8.

It is submitted, therefore, that the defendant in error, plaintiff below, has not proved either a valid record title or a good title by adverse possession, and consequently that she was not entitled to recover. The judgment of the territorial court should be reversed, and the cause remanded for a new trial.

M. F. MORRIS,
For Plaintiff in Error.

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JAMES H. McKENNEY.
CLERK.

117-346

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1885.

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In Error to the Supreme Court of Montana Territory.

Brief of JOSEPH K. TOOLE, of Counsel for Defendent in Error.

Geo. E. Boos, Book and Job Printer, Helena, Montana.

Supreme Court of the U. S.

No. 66.

ELIJAH M. DUMPHY, PLAINTIFF IN ERROR,

versus

ELLEN SULLIVAN, DEFENDANT IN ERROR.

Error to the Supreme Court of Montana Territory.

BRIEF OF DEFENDANT IN ERROR.

The condition of the record in this case suggests the propriety of first ascertaining, which, if any of the points sought to be raised by plaintiff in error, are so presented as to authorize this Court in considering the same, before the merits of any of them are discussed. This we shall proceed to do in their regular order:

I.

The sufficiency of the evidence to support the special and general verdict and judgment of the Court will not be considered, for the reason that neither the notice of motion for new trial or assignment of errors specifying in

what particulars the same is insufficient. The code of civil procedure of this Territory passed at the Tenth Session of the Legislative Assembly, provides as follows:

"When the *notice* of *motion* designates as the ground of the motion insufficiency of the evidence to justify the verdict or other decision, the *statement* shall specify the particulars in which such evidence is insufficient. * * * If no such specification be made the statement shall be disregarded on the hearing of the motion." (Page 113, and Third Subdivision of Section 287, Tenth Session laws.)

"When the motion is to be made upon the minutes of the Court, and the grounds of the motion is the insufficiency of the evidence to justify the verdict or other decision, the *notice* of *motion* must specify the particulars in which the evidence is alleged to be insufficient. * * * If the *notice* does not contain the specifications here indicated, when the motion is made on the minutes of the Court, the motion must be denied." (See Fourth Subdivision of same Section.)

"If the motion is to be made upon a Bill of Exception and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after the service of the notice to prepare and obtain a settlement of the bill of exception as is provided after the entry of judgment or after receiving notice of such entry as provided by Section 281, and the bill of exceptions shall be *prepared* and *settled* in a similar manner. If a bill of exceptions has already been settled and filed when the notice of motion is given, such bill shall be used on the motion." (See Second Subdivision of same Section.)

The mode provided for *preparing* and settling Bills of Exception by said Section 281, is as follows:

"The point of the exception shall be particularly stated, *except as provided in relation to instructions.*" * *

These, we believe, are all the provisions of the Code applicable to this question. It will be seen that the notice

of motion, found in record, page 60, designates that the motion will be based upon affidavits, bills of exceptions, minutes of the court, and statement of the case. The affidavits referred to have no connection whatever with the question of the sufficiency of the evidence and besides none were filed if they did. Hence it will be observed that the specification of the particulars in which the evidence is insufficient should have been made. This not being done the Court will not consider that question but will assume that the evidence amply sustains the special findings, general verdict and judgment of the Court. If the plain language of the statute requires any interpretation it will be found in the decisions of the Supreme Court of this Territory in the following case: Griswold vs. Baley, 1st Montana, 545.

Nor is any objection urged as to the sufficiency of the findings to support the judgment. Nor could it be made ~~evidence~~ if there was. There must be an absolute inconsistency between the express findings and the judgment, and not that they are insufficient to support it. Chumasero vs. Vial, 3d Montana, 376; Mathuas vs. Kinsell, 41 California, 5-12.

Besides, no exception was taken to the want of a finding upon any material fact, no finding thereof requested, the presumption will be that every fact necessary to be found, and not contained in the express findings, were found by the jury to support the judgment. Henry vs. Evarts, 30th California, 425; Lemksbeny vs. Magroff, 33d California, 237; James vs. Williams, 31st California, 211.

There is no absolute or any inconsistency between the findings and the judgment. The Court will assume therefore that they are sufficient to support it, and that the evidence supports the findings.

Nor will the Court consider any of the pretended exceptions contained in the statement settled long after the trial unless embodied in the bills of exceptions taken *during* the trial, for the reason that it does not appear from

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Nor will the Court consider any of the pretended exceptions contained in the statement settled long after the trial unless embodied in the bills of exceptions taken *during* the trial, for the reason that it does not appear from

statement that the objections at the time were delivered *in writing* to the *Judge*, entered in his minutes or written down by the Clerk. (See record—Greenhood vs. Randall; Randall vs. Greenhood, 3d Montana; Greenhood vs. Randall, 111 United States, 775.)

Limiting this inquiry therefore to the bills of exceptions embodied in the record, do they disclose any grounds upon which a reversal shall be had?

First—As we have seen by the Section of the statute quoted, the exception must point out specifically the grounds of the objection relied upon. Second—It is a familiar and universal rule that the party making the objection is confined to the particular objection thus made; and Third, That by Section 279, page 110, of the Code referred to, it is provided—"That no exception shall be regarded on a motion for a new trial or on appeal unless the exception be material and affect the substantial rights of the parties."

Tested by these rules, how do we find the bills of exception, taking them up *seriatim* as they appear in the record:

Bill of Exceptions, No. 1, page 6 of record, contains an objection and exception to the abstract of the Register of the United States Land Office, "for the reason that the same was not competent evidence to establish the conveyance of land by the United States to any person."

First—It is shown that the patent was not in possession of plaintiff and was likely lost, and this was the best evidence that one had issued to the Probate Judge.

Second—If not competent to establish a legal paper title, it was competent to show that plaintiff and her predecessors in interest claimed under color of title exclusive of any other right, as affecting that branch of her title under the statutes of limitation.

Third—It could not have injured the defendant, first,

because they both claim a title under and from the United States, through the Probate Judge; and second, because the patent was afterwards introduced without any available objection and exception, which established the fact of its issuance and cured any error that might have occurred.

Fourth—Because it could in no manner affect the findings of facts upon the issue of adverse possession, and tended to show color of title and good faith in plaintiff and her predecessors in interest claim to the property.

It will be seen from Bill of Exception No. 2, page 8 of record, that no specific objection was made to the introduction of the copy of this patent as found upon the County records. If plaintiff in error had objected at *the time* to its introduction, for the reason that the original was not sufficiently accounted for, or its loss established, the proofs might then and there have been supplied. The very object of requiring the objection to be thus specifically pointed out *at the time* the evidence is offered, is to afford an opportunity to supply the requisite evidence and avoid error. He cannot afterwards insert this kind of an objection in his assignment of errors and make it available after gambling for a verdict. And this is what he has tried to do. (See record, page 60, Subdivision 6.) Besides, plaintiff was not injured but benefitted, as he claimed title under this very patent to the Probate Judge, and without which he had no pretext for a claim to the property in question.

As to Bill of Exceptions No. 3, the reasons heretofore given in reference to Nos. 1 and 2 will apply with equal force to it. Besides both parties claimed Lot 8, Block 30, under the Helena Townsite entry, and it was important to both to show that there was such a lot, nor does the objection or exception amount to anything. The exception found on record, page 11, shows that the introduction of the plat was objected to for the reason that it was not properly authenticated, and because it does not show that

it was the original plat or was approved by the Board of County Commissioners, but the bill of exceptions wholly fails to show that these *facts* did not appear from the plat itself or other competent evidence.

It seems to us that it would be a very difficult matter to establish injuiry to any one when both parties claim the property, as Lot 8, in Block 30, under the Helena Townsite, by introducing any kind of a plat showing the *locus in quo*, about which there is no dispute. Even if there was a question as to the identity of the property and a map was improperly admitted, injury would have to be shown, as it must controvert some material fact claimed by plaintiff in error, not support that fact. Here it is not shown that the plat did not locate Lot 8, in Block 30, as being the identical twenty-five feet of ground in Main street, in Helena City, as claimed by both parties. It does not appear that it was not the original map approved by the Board of County Commissioners, and if it did there could be no pretext for claiming that any injury occurred under the facts and issues in the case.

By this Bill of Exceptions it will also appear that the application of Wau Lee, one of the predecessors in interest of defendant in error, made a written application to the Probate Judge for a deed to the lot in question, which was offered in evidence. The plaintiff "*objected to the introduction of the same*" without assigning any reason therefor. Such a bill of exception as we have seen is unavailable for any purpose. If, however, it was it might be easily shown that such an application was eminently proper under our statute. No specific objection is pointed out to its form or sufficiency, and if none at all was necessary it certainly did not injure plaintiff in error or impair his ~~title~~ title. At all events a deed was given the applicant and the law will presume that the officer making it did his duty, and that the preliminary steps necessary to procure it had been properly taken—in that the application was regular in the absence of any showing to the contrary.

It was proper to show how he applied for the deed, and if there was anything wrong about it the error should have been pointed out. There is nothing in the point under any state of facts found in the record.

Section 1209 and 1210, of the Act of the Legislative Assembly, provides that "every claimant shall file in the office of the Probate Judge a statement of his or their claim, etc. * * * Such statement shall be in writing, signed by the party making the same and certified by the affidavit of such party, etc., etc. ** * Such statement shall specify the grounds of such claim, particularly describing the lot claimed, the date as near as may be of the occupation of said lot and by whom, what improvements have been made on said lot, and the value thereof and that *such lot is now actually possessed and occupied* by such claimant." * * * The applicant being the actual occupant complied literally with the statute. The proof may not have been necessary, as the deed may have been sufficient to raise the presumption that it was made, the form and sufficiency thereof being in no way questioned.

In the same bill of exceptions plaintiff objected to the introduction of the deed to Wau Lee from the Probate Judge for the reason "of *its invalidity as a conveyance of the property*, and that it was incompetent, it appearing that it was executed to a Chinaman, a person not allowed by law to become a citizen of the United States."

As to the first grounds of objection, the deed appears to be in due form and sufficient for the purpose. No defect is pointed out affecting its validity, and under the statutes and decisions quoted the exception is unavailable.

The second objection is equally untenable. The insertion by the officer in this deed of the word in brackets [Chinaman] was not necessarily or properly in the deed, and is consequently not competent and sufficient evidence to show that the grantee was *an alien born Chinaman* if it was at all material. Besides it could make no difference

whether the deed was valid or invalid on account of being made to an alien Chinaman. Under the pleadings and evidence introduced *without objection*, it was competent evidence as affecting the claim of the defendant in error, a successor in interest of the grantee in the deed under the statutes of limitation.

There are three phases to this case: First, Strict legal title; Second, Title by adverse possession; and Third, In the absence of title by either of these, the prior possessory title. The deed was certainly competent even if invalid, as showing a link in the chain of title to her as affecting the *good faith* and character of her claim under the statute of limitations, making possession. It tends to show that she had reason to believe that she was the owner of the lot when she went into possession of it, and especially that whatever claim she made was one of title exclusive of any other right. It may be claimed that the deed from McCann to her is all-sufficient for that purpose. We grant that it is. Yet, certainly no one can be injured if she desires to go further than is necessary and show that she claims through his predecessors in interest, however defective their title may be. If she held the property for the statutory period of acquiring it by adverse possession, and the fact that she derived under *color* of *title* is essential for that purpose, it would be difficult to see how a deed to her predecessor in interest is not competent to show *color* of *title* or the character of claim she asserted Besides we shall hereafter see that it was not necessary to connect herself with her predecessors in interest in order to acquire title by adverse possession as she occupied the property for the requisite period under McCann's deed, and after the conveyance of the Probate Judge to Tanner, a predecessor in interest of plaintiff in error. So that at all events no possible injury could occur. But aside from all this, as affecting the strict legal paper title it was competent. Besides being necessary to set the statute of limitation in motion, (it not ~~occurring to the~~ running against the Probate Judge) it was a valid deed and conveyed a valid title to

Wau Lee—even if it is to be assumed that he was an alien Chinaman; first, because none but the Government could take advantage of it and set it aside, the same being good as to third parties, and second, because the Act of Congress in disposing of the town lots after a patent has been issued to the Probate Judge, expressly provides that he shall hold it in trust for the actual occupants thereof. It is plain and unambiguous, ~~and reads as follows:~~

Section 2387, page 437, Revised Statutes of United States, Second Edition, A. D. 1878, reads as follows:

"Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it is lawlul, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the Judge of the County Court, for the County in which such town is situated, to enter at the proper Land Office, and at the minimum price, the land so settled and occupied in trust for the several *use and benefit of the occupants* thereof, *according to their* respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

The case of the State of Nevada ex rel. Faok Lurg, is precisely in point except the word *bona fide resident* is used instead of *occupants*. (See case cited, 18th Nevada, 261.)

The Legislative Assembly in the Sections of the Act heretofore quoted, recognizing the right of Congress in primarily disposing of the soil likewise provides for the execution of a deed to the occupant of the lots without reference to whether he is an alien or not, or whether if an alien he has declared his intentions to become a citizen. We will not consume time in presenting an argument to uphold the policy of this legislation, as applied to the case

at bar, as contradistinguished from pre-emption, homestead and mineral entries, in each of which it is expressly provided that none but citizens, or those who have declared their intentions to become such, shall receive patents therefor. Here the deed is executed after the emination of the patent, and the Court cannot limit the term occupant to citizens, or those who have declared their intentions to become such, without legislation, and defeating the right of Congress to primarily dispose of the soil. If Wau Lee had no right to receive a deed Tanner did, and according to the findings, as we shall presently see, defendant occupied the property under the deed for full three years, the statutory period of limitations, after the execution of the deed to Tanner. If this is true, it is idle to talk of injury to plaintiff in error, however defective her paper title. This Court held in the case of Leffingswell vs. Warren, 2d Black, 605, that a void tax deed was sufficient to set the statute of limitations in motion when the grantee had otherwise brought himself within the rule. Much more then would this void deed be competent as affecting the bonafides of the claim of a successor in interest of such a grantor. The immediate grantor would certainly be charged with the infirmities of his deed to the full extent that his successor in interest would be. They both characterize the claim, and as much in the one instance as the other. This deed to Wau Lee was competent evidence on this wing of defendant in error's title.

By reference to Bill of Exceptions No. 4, as found on record, pages 14 and 15, in so far as it relates to the introduction of the deed from Lum Sing to Patrick McCann, it will be seen that no objection was made or exception taken that can be entertained by the Court. It was not even objected to on any particular grounds; counsel contented themselves by saying in their bill of exceptions: "To the introduction of which defendant then and there objected." The Court overruled the objection and the defendant excepted.

The remaining portion of this bill of exceptions goes to the testimony in reference to the contents of a deed from Wau Lee to Lum Sing. This could not affect that branch of the case by which title was claimed by defendant in error under the statutes of limitation; first, because she held for three years after her deed from Lum Sing to McCann, and from McCann to her, *which were introduced without objection*, as shown by the bills of exception and opinion of the Court in this case.

But if incompetent for any purpose it was stricken out on motion of plaintiff in error, as will be seen by reference to bottom of pages 30–31. This, we submit, sufficiently disposes of Bill of exceptions No. 4. See also note of ~~Page~~ Judge at close of this bill of exception on page 16. This shows that the Court did not consider the execution and loss of the deed from Wau Lee and Lum Sing sufficiently accounted for, and consequently struck out the evidence in reference to it.

As to Bill of Exceptions No. 5, found on pages 23–24, it will be seen that none of the objections specify any reason except the one in reference to the contents of the deed from Wau Lee to Lum Sing, which evidence, as we have shown, was stricken out.

The motion for a non-suit and to strike out certain evidence as contained in Bill of Exceptions No. 6, has been considered as the questions arose in the record. The motion to strike out certain evidence was sustained as to the seventh and eighth grounds. (See record, page 81.) These are the only grounds worthy of any consideration

Nor can the exclusion of all of the evidence of the deed and its contents from Wau Lee to Lum Sing affect the title of defendant in error under the statutes of limitation. It breaks a link in the chain of paper title but does not disturb the continuety of her actual possession, or the claim under which it was held. It is not necessary to connect herself with the title of Lum Sing, as the jury find as a *fact* that she entered *into actual* possession under her deed from McCann at the

date of her deed on August 2d, 1870, and continued to so occupy it to October 4th, 1877, is more than *three* years. (See special findings six and seven, page 56 of record.) Hence it could not affect the results of this case whether all antecedent deeds were stricken out. Whether McCann had any title at all or not, if defendant entered under a deed from him into the actual possession of the property and occupied it for three years under the statute, she acquired a title by disseizen of the real owner. This 25-foot town lot had a 24-foot cabin on it. This fact was not controverted; it was not necessary to submit a special finding upon it. If it was, plaintiff in error should *as we have seen*, have offered it or it will be ~~claimed~~ deemed to have been found to support the judgment. And so it is this log cabin twenty-four feet wide by sixteen feet deep, fronting on Main street, was taken actual possession of by defendant in error, upon the receipt of her deed from McCann on the 2d of August, 1870, which was actually and continuously occupied by her up to her eviction on the 4th of October, 1877. (See evidence of Joshua Armitage and others, page 40, and special findings 5, 6, 7 and 8, page 56, of record.) And the Supreme Court of our Territory have interpreted our statute of limitations by its instructions and sustaining the judgment upon the facts found. It is a part of our practice act and the construction thus given it, will not be disturbed.

The jury find that defendant in error took *actual* possession of the property on the 2d of August, 1870, *under her deed* and continued to hold such actual possession up to October 4th, 1877—a period of over seven years. Actual possession of this house has a definite legal signification as contradistinguished from constructive possession, and the Court, as we have seen, will assume that the evidence in this case amply supported the findings.

If no title passed from the Probate Judge until the issuance of the deed to him (Tanner) and the statute did not begin to run in favor of defendant in error until that

time, it will be seen by record, page 32, that this deed bore date February 23d, 1873, and that the defendant in error remained in the actual possession under her deed from August 2d, 1870, to October 4th, 1877, the date of the ouster by plaintiff in error. Hence there was a period of over three years occupancy by her after the deed was made to Tanner by the Probate Judge. Our statute of limitations on this point is as follows.

"Section 4. In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of the premises by another shall be deemed to have been under such legal title, unless it appear that such premises shall have been held and possessed adversely to such legal title for three years before the commencement of the action."

"Section 5. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or judgment, or decree laid, it shall be deemed to have been possessed and occupied in the following cases: First—Where it has been usually cultivated and improved. Second—Where it has been protected by a substantial enclosure. Third—Where (although not enclosed) it has been used for the purposes of husbandry or pasturage, or for the ordinary uses of the occupant. Fourth—When a known lot or single farm not exceeding one hundred and sixty acres in extent has been partially improved, the portion of such farm or lot that may have been left, not cleared or not enclosed according to the usual course or custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Hence, when defendant in error entered into possession of this cabin and lot under her deed from McCann and continued in such possession, she acquired a title sep-

arate and distinct from that conveyed by deeds and about which alone exceptions have sought to be taken.

Mr. Tyler in his work on Ejectment, page 852, lays down the following rule: "Whenever the statute declares what shall constitute the possession adverse, the question is settled by a reference to the statute, and the decisions of the Courts which have been made under it. But when the statute is silent upon the subject, the question is settled by general principles, which have been sanctioned by the Courts."

Our statute, as we have seen, has spoken upon the subject and an interpretation has been given it by the highest judicial tribunal in this Territory in the case of the National Mining and Exploring Company vs. Powers, 3d Montana, 344 *et seq.*, and in the very case at bar.

Defendant entered peacably into the actual possession of the cabin and lot under her deed on the 2d of August, A. D. 1870, and continued to occupy it up to October 4th, 1877. Section 3, of Statutes of Montana Supra, is as follows: "Any peacable entry upon real estate *shall be deemed sufficient* and *valid* as a *claim* unless an action be commenced by the plaintiff for possession within one year from the making of such entry, or within *three years from the time when the right to bring such action occrued.*" What then was the effect of the adverse occupation of the defendant in error *under her deed* for the three years after the emination of the *two patents*, the one to Wau Lee and the one to Tanner, stripping the case of all other questions and considerations?

If she acquired a title as against the true owner *whomsoever he may be*, what was the effect, and how is it to be lost or divested?

We assert that under the authorities and construction given this statute by our own Supreme Court, that it divested plaintiff in error and his predecessors in interest of their true paper title (if they ever had any) and vests a

perfect title in defendant in error. In support of this we refer to National Mining and Expioring Company vs. Powers, Supra, page 348, 3d Montana, where the following language is used, and authorities cited:

"Was the possession of Mrs. Powers adverse *under the laws of the Territory?* She made a peaceable entry upon the premises, enclosed the same by a fence in 1872, and annually cultivated and improved the same from 1872 to 1876. If her possession during the time was adverse to that of applicant, she acquired a *good title* to the land which she actually occupied. The Courts have held under similar statutes that adverse possession not only bars the *remedy and extinguishes the right of the party* having the *true paper title*, but *vests a perfect title* in the *adverse holder*. See Leffingwell vs. Warner, 2d Black, U. S., 599; Meeks vs. Vassault, 3d Sawyer, 206; Anington vs. Lescom, 34 California, 365; Cannon vs. Stockman, 36 *id*, 535; Fegg vs. Mayo, 39 *id*, 262; Morris vs. DeCelis, 51 *id*, 55; Angell on Limitations, 5th Ed., Ch. 31."

Such was the interpretation given to the California Statute from which ours is taken, and our Courts have followed it. Pursuing this case further, it will be seen that the first entry of plaintiff in error, or his predecessors in interest, was when defendant in error was evicted on October 4th, 1877. She brings this suit before the expiration of two years therefrom, to-wit: June 3d, 1879, and defendant therein answers on November 21st, 1879. She had not lost her title by adverse possession, has not conveyed it away or otherwise disposed of it, but holds it yet, and here and now claims her right to it.

The substantial facts in this case, uncontradicted and uncontrovertable, creating a title by adverse possession in defendant in error can only be defeated upon the theory, that after it is *so acquired* the former owner of the property by bare entry could divest her of her title and of the remedies afforded by law for its protection. Such a position we assume is too unreasonable to be entertained for a

moment. Yet it covers all the merits plaintiff in error has in this case.

As we have seen, there is not an exception taken by plaintiff in error touching the title of defendant in error by adverse possession. No objection to the evidence that the lot was covered to the extent of a 24-foot cabin. No objection to the sufficiency of the evidence to support the findings that she entered into actual possession under her deed on the 2d of August, 1870, and continued so to possess it up to October 4th, 1877. These were naked facts requiring no interpretation by instructions, but "*ip so facto*" constituting adverse possession under the statutes of the Territory of Montana.

Had the Court submitted the proposition to the jury as to *whether defendant* in error held adverse possession of the property for the period of three years, then instructions defining what constituted adverse possession would have been proper, and any error in them reviewable as affecting the merits of the controversy. But such is not the case here. The jury find entry and actual possession by defendant in error, under her deed continued for seven years, which is of itself declared a "*sufficient and valid claim*," by Section 3 of the statute quoted, and is made adverse possession by the express terms of Sections 4, 5, 6, and 7. And this really is all there is in the case, and such is the view taken of it by the Supreme Court, from which this appeal is taken, as will be seen by reference to opinion by Galbraith, J., record page 64 *et seq.*

Under this view of the case we claim that the instructions cut no figure and could not affect the merits of this controversy. Should the Court, however, be of a different opinion, we respectfully submit the following points and authorities in reference to them:

First—We assert that under the provisions of the Practice Act of Montana Territory and the decisions of the Supreme Court thereof under it, there is not a single exception embodied in the record that can properly be

considered by this Court. Section 253, Subdivision Seventh, page 102, Tenth Session Laws of Montana, 1877, reads as follows:

"Seventh. When either party asks special instructions to be given to the jury the Court shall either give such instruction as required, or positively refuse to do so, or give the instruction with a modification, and shall mark or endorse upon each instruction so offered in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused, so that either party may accept to the instructions as given or refused, or modified or to the modification thereof. All instructions given by the Court, with those refused, must be fied as part of the record. If either party to the trial desires to except to any instructions given by the Court, or to the refusal of the Court to give an instruction asked for, or any modifications thereof, *he shall reduce such exception to writing and file the same with the Clerk before the cause is submitted to the jury.*"

The object of this law was to call attention to the particular objection to instructions *given* or *refused* or *modified* before the cause is submitted to the jury so as to enable the Court to consider the same. This is too apparent to require comment. As will be seen by Bill of Exception No. 8, record page 44 *et seq.*, plaintiff in error contented himself by simply excepting to the *giving, refusing* and *modifying* the instructions sought to be excepted to. The Supreme Court of this Territory has passed upon this precise point in the case of Randall vs. Greenhood, 3d Montana, page 506. The exception does not show that the objection in writing was filed before the case was submitted, as required by the statute. Upon this point the Court say, after quoting the foregoing section of the Practice Act: "This Section contemplates that the exceptions to instructions must be reduced to writing in a bill of exceptions (which of course must be signed by the Judge) and filed with the Clerk before the cause is submitted to the

jury. Not one of the exceptions to the instructions, as shown by the record, comply with these requirements. The mere statement of the record that the Court was asked to give certain designated instructions, which were refused and ~~the~~ an exception taken, or that the plaintiff objected to the giving of certain instructions which were refused and exception taken, or that plaintiff objected to giving certain instructions that were afterwards given, to the *giving* of *which the party excepting excepted*, without reducing *such exception* to *writing* and *filing* the same with the Clerk, is no compliance with this Section of the Code." As will be seen by the record and brief of counsel in the foregoing case it was contended that as the bill of exceptions in reference to instructions showed that the party *there and then and* at *the time duly excepted*," the Court would assume from the language ~~and~~ that the objection in writing was filed as required. But the Court held otherwise, and that it should so appear in the bill of exceptions. And this Court in reviewing the construction thus given of the Practice Act in that particular disposes of the case as follows: "This judgment is affirmed. The record fails entirely to present in proper form any of the questions which have been argued for the plaintiff in error."

But above all the Supreme Court of this Territory has considered these very exceptions insufficient, under the section of the Practice Act quoted, as will be seen from the record in this case, page 66, where the following language is used: "We are warranted therefore in concluding, from the *special findings*, general verdict and *instructions* of the Court, in *relation to the acquirement of title by adverse possession*, to which no specific objection is made by the defendant." * * * *

There was no objection to the evidence of adverse possession, under the *issues* as joined, so that leave to amend the pleading could have been had if it was necessary. No objection was made to the sufficiency of the evidence to support the findings, or, of the findings to support the

judgment, or any additional findings requested; and no exceptions, properly saved to the instructions upon the subject of adverse possession: and there is consequently not a tenable proposition upon which the plaintiff in error can rely so far as *this branch* of the case is concerned. The objections and exceptions urged can have nothing whatever to do with the special findings of naked facts, constituting within themselves adverse possession under the statute referred to and under the construction given it, by the highest judicial tribunal of this Territory.

"If the instructions in this case were of any consequence whatever in determining the question of *adverse possession* under either special findings or a general verdict, and exceptions had been properly saved, it is quite apparent that Nos. 12 and 16, offered by plaintiff in error and given by the Court, present his side of the issue much more favorably to him than the statutes upon this subject and the interpretation given them by the Courts."

In addition to the foregoing we also respectfully submit the following points and authorities as presented in the Court below, and especialld call attention to the able and pointed opinion of the Court upon the questions involved:

"The complaint avers ownership, coupled with right of possession. The third count alleges quiet, exclusive and continuous possession of the premises from August, 1866, at which time the ouster is alleged."

"1. Appellant claims that the plaintiff failed to allege the statute of limitations or adverse possession as a separate source of title, and hence must rely upon her paper or legal title."

"The third subdivision of the complaint seeks to raise this very question; issue is joined upon it by the appellant's answer, and proof was introduced under it without objection, and the case tried in the Court below upon that theory. After pursuing such a course, it is too late now

to object, if, in the opinion of the Court, the statute was not properly pleaded. But it was unnecessary to plead the statute. The allegation would be surplusage. Under the allegation of ownership, coupled with the right of possession, adverse possession could be shown. (Gillespie vs. Jones, 47 Cal., 259.")

"No error occurred by reason of the introduction of any evidence relating to the Helena Townsite, copy of patent or application of Wau Lee. Sufficient foundation was laid for the introduction of the former, and the latter was the best and competent evidence of the fact it seeks to prove. But the entire evidence to which exception was taken was not material, and could have worked no injury to applicant. The rule is, that where both parties claim title from the same source, the paramount source need not be shown. (Whitman vs. Steiger, 46 Cal., 256.) Such are the facts in this case, as shown by the evidence and the answer of defendant."

"2. It was never contended in the Court below that an alien Chinaman could acquire title under the homestead, pre-emption or mineral land laws. It was not necessary to maintain such a proposition to meet this case."

"The property conveyed was a portion of the townsite of Helena. This property, as conceded by the brief of appellant, was held in trust by the Probate Judge for the use and benefit of the occupants thereof. No question of citizenship was reserved, but occupancy alone is made the test of right to acquire title."

"But if the property could only vest in a citizen, or one who had declared his intention to become such, this disability could not be taken advantage of by a private individual, and as between citizen and alien their titles are equally secure and sacred, and equally entitled to the protection of the law. The sovereign power, only by "office found," can divest the title. (Territory vs. Lee, 2 Montana, 124.")

"It is said that an alien can take by deed and can hold until "office found," must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. (Governeur's Heirs vs. Robertson, 11 Wheat., 619; top page, side page 356; Craig vs. Leslie, 3 Wheat., 563; 7 Cranch, 603; 6 McLean, 5.")

"But after all such a question is not properly presented by the record. There is no evidence to be found in the record, nor was there any in the case that "Wau Lee" was an *alien*. Appellant contented himself bys howing upon the trial that Wau Lee was either a "wash-house" or a "Chinaman." That if a "wash house," not being *in esse*, no title passed; and that if Wau Lee was a Chinaman, he could not, under existing laws, become a citizen. But, as before shown, citizenship was not involved, mere occupancy being the *sine qua non*. If, however, citizenship was necessary, it will be presumed. The authorities are uniform, so far as we know, that every person residing within the jurisdiction of the United States is supposed to be a *natural born* subject until the contrary is found. (Governeur's Heirs vs. Robertson, 11 Wheat., top p. 619; 6 Black, f. p. 488.")

"Appellant could have had the finding of the jury upon this question. Their finding was that, "Wau Lee" was a "person."

"Appellant asserts again in his brief that the application by Wau Lee for a deed was a nulity, because the blanks were not filled. The objection is technical. The requirements of the statute were substantially complied with; but both parties claiming under the Probate Judge, as well as by adverse possession, the evidence became immaterial. (Whitman vs. Steiger, 46, Cal., 256.")

"If there was any defect in the application or right in the appellant, before the Probate Judge's deed issued, it should have been asserted in the manner pointed out by the statute. Section 1215, R. S. of Montana, provides:

"'In cases where there is a dispute or contest in regard to the right to the deed to any lot or lots, the Probate Judge or corporate authorities, as the case may be, shall hear the testimony relating thereto at such time as they may fix therefor; and after two days' notice of such time and place of hearing given to each and every contestant, they shall proceed to hear and decide such claims, in accordance with the principles of right and justice, and the provisions of this chapter; and in case there shall be no appeal taken from such decision, as hereinafter provided, then after ten days from the rendering of such decision, the said Probate Judge or corporate authorities, as the case may be, shall proceed to make a deed, as provided in section 1213 of this chapter, to the person or persons to whom the lot or lots may have been awarded: *Provided*, The corporate authorities or Judge, as the case may be, may adjourn from time to time, as they may deem just, for the fair adjudication of said claim or claims.'"

"When a right is given and a remedy prescribed in the same statute, the remedy is exclusive of any other and must be followed. (Territory vs. Deegan, 2 Mont. 82; Dudley vs. Mayhew, 3 N. Y., 15.")

"Upon a further examination of the record and bill of exceptions, we see that only a *general objection* was made to this evidence. (See Bill of Exceptions, record p. 32.) It has been repeatedly held that this sort of objection will not do. He must point out the objection. (People vs. Apple, 7 Cal., 289; Kiler vs. Kimbal, 10 Cal., 267; People vs. Manning, 48 Cal., 335.")

3. "As to the third point raised by appellant, we respectfully submit that there is nothing in it. (See amendment to bill of exceptions No. 4, record pp. 43–44.) This testimony, which is now at that time claimed to be objectiontionable, and was sought to be made the basis of error, was, upon appellant's motion, taken from the case and the consideration of the jury. (See motion, record p. ; order striking out evidence, record p. 86.")

"If there was anything in the fourth point relied on by appellant as to the apparent discrepancy between the date and apparent acknowledgment of the deed from Lum Sing to McCann or as to any other objectionable matter, appellant, in order to be heard upon it here, should have laid his finger on the particular objection in the Court below; this he failed to do. (See bill of exceptions, record p. .")

"Authorities have been cited to show that such an objection is worthless. (People vs. Apple, 7 Cal., 289; Kilner vs. Kimbal, 10 Cal., 267; People vs. Manning, 48 Cal., 335.) But how could the introduction of this deed injure appellant? It was good without an acknowledgment to show color of title. (Taylor vs. Holter, 1 Mont. 688.) The acknowledgment only entitled it to record so as to impart constructive notice. *Actual notice* having been found by the jury, the deed cut no figure in the case. (See special findings.")

"5. Instruction No. 1, states the law correctly. (Whitman vs. Stieger, 46 Cal., 256.) Numerous authorities could be cited to sustain it."

"6. Appellant has not pointed out any error in any of the instructions, or referred to any authorities."

7. "No error can be shown as to the notice of appellant respecting his good faith in making improvements. The question of notice was fairly submitted to the jury, and they find that appellant had both actual and constructive notice. (See special findings 11 and 12, record p. .) Actual notice having been found, any instruction touching the question of constructive notice (if erroneous) could not have injured appellant. No one would contend that the amount of improvements put upon the property even if in *good faith* impaired the title of the true owner or created a limit or incumbrance on it. It would simply be an offset against damages for detention."

The Section of the statutes of the Territory in reference to such improvements reads as follows:

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Supreme Court of the U. S.,

OCTOBER TERM, 1885,

No. 168.

ELIJAH M. DUMPHY, PLAINTIFF IN ERROR,

versus

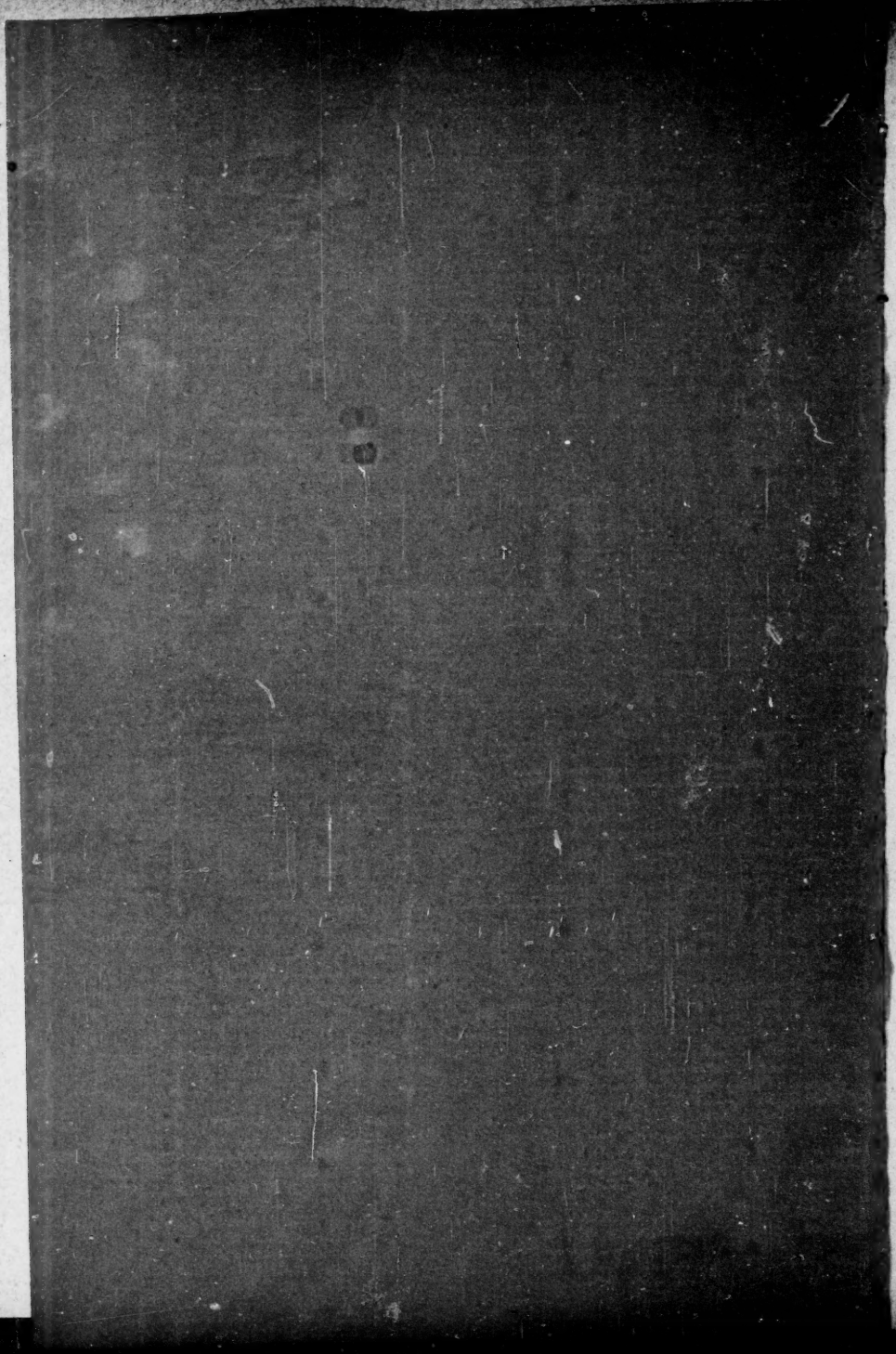
ELLEN SULLIVAN, DEFENDANT IN ERROR.

In Error to the Supreme Court of the Territory of Montana.

BRIEF OF DEFENDANT IN ERROR IN REPLY.

EDWIN W. TOOLE,
Of Counsel for Defendant in Error.

Geo. E. Boos, Printer, Helena, Montana.



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BRIEF OF DEFENDANT IN ERROR IN REPLY.

I.

STATEMENT OF CASE.

On the 2d of March, 1869, the probate judge of Lewis and Clarke County, Montana Territory, *entered* in the United States Land Office for the District of said Territory, the Helena town site and on the 14th day of September, 1869, likewise *entered* an addition to the same, both being *cash entries.* (See record pp. 6 and 7.)

The patent, however, upon this *cash entry* did not issue to the probate judge until the 16th of June, 1872, when it was probably reached in its order.

On the 26th of March, 1869, one Wau Lee, who had a cabin on the premises, and was an *occupant* of it, filed his application No. 501, for a deed to said property (record p. 11) On the 18th of September, 1869, the probate judge made a deed to said Wau Lee (record pages 12 and 13.) On the 25th of September, 1869, Wau Lee deeded to Lum Sing which deed was lost (record pages 18 and 19, evidence of McCann, Sweeney and Babcock,) and on the 30th of September, 1869, Lum Sing conveyed to Patrick McCann and delivered him possession of the property (record 14 and 15.) During the ownership of McCann, John M. Sweeney, who had a store directly opposite this property, acted as McCann's agent, collected the rents and paid the taxes, until it was sold by McCann to plaintiff (record pages 21 and 22, and evidence of Ashby.) On the 2d day of August, 1870, McCann sold and delivered possession to plaintiff (record p. 17.) John M. Sweeney continued to act as agent for her, collect her rents and pay her taxes, up to January 20th, 1884, see record pages 21 and 22, being six months longer than it was necessary to acquire title by adverse possession, if the deed from the probate judge to Wau Lee was valid. In 1875 Ryan took charge of the property, as agent of the plaintiff; after that Shrover, and a man by the name of Hoyt had charge of it when this suit was brought. (Record pages 20 and 21.)

On the 22d day of February, 1873, while plaintiff was thus in actual possession of said property by her tenant and receiving rents and paying taxes through her agent, John M. Sweeney, (see record 21 and 22 and evidence of S. C. Ashby 26) N. Hilger, successor to Truett, assumed to again convey this property as probate judge, and on the 22d day of February, 1873, executed a deed to A. L. Tanner. On Feb. 27th, 1873, Tanner conveyed to I. I. Lewis on the 29th of September, 1873, Lewis conveyed to Asenath Martin, and on the 29th day of January, 1875, Martin conveyed to a man named Joshua Armitage, who claims to have went upon the property and nailed up the cabin being the first *evidence* of any possession under the Hilger conveyance, and over five years from the entry of defendant's predecessor under the convey-

ances from Probate Judge Truett. On the 4th day of October, 1877, Armitage conveyed to Dumphy the plaintiff in error, and on the 3d of June, 1879, the defendant in error brought this action to recover said property. The case was submitted to the jury upon the evidence in the record, and much indeed not contained in it.

The statement does not purport to contain all the evidence, nor was it proper that it should contain any more than was necessary to explain the points raised and renewable on appeal. There were special findings and general verdict rendered by the jury, (record 57, 58 and 59.) The court, before whom the case was tried, overruled the motion of plaintiff in error for a new trial. He appealed to the Supreme court of the Territory, it affirmed the judgment of the district court, and he now presents his writ of error to this court.

BRIEF AND ARGUMENT.

The whole merits of this controversy have been presented in the brief and argument of the Hon. Joseph K. Toole, with whom we are associated in the case for defendant in error.

I.

Plaintiff in error complains because the jury returned a special as well as a general verdict, and asserts that it looks like oppression "to find generally against a party and at the "same time find against him all the facts which could mili-"tate against the general finding." Had the attorneys who tried this case rendered it necessary to embody all the evidence adduced on the trial in the record the finding and verdict would be readily explained. These special issues were submitted by plaintiff, no objection or exception taken to them, and they are embraced in the statement of plaintiff in error and are part of the record in this case.

It is claimed that the evidence is insufficient to support the verdict, in that it does not appear from the statement that defendant in error was in the occupation of the property from January 29th, 1875, when one Armitage (seizing his

chance, locked up the house on the premises), to October 4th, 1877.

This is the first time that the insufficiency of the evidence in this or any other respect has been urged by counsel. There is a general statement in the motion for a new trial that the "evidence is insufficient to support the verdict." It does not designate in that particular it is insufficient, nor does the statement contain any such designation. The practice act of Montana in that respect is identical with, and was taken from that of California and Nevada, and the courts follow the decisions of those States made under it. The statement comprising the record in this case from page 1 to page 62 inclusive, nowhere designates as a ground for setting aside the verdict, insufficiency of the evidence in respect to this or in any other particular. Hence it was never before urged, was not and could not be considered by the court in passing on the motion. Had plaintiff in error designated this as a ground upon which he would rely, in his statement defendant in error would then be called upon to see that all the evidence upon that point was embodied in the record. As it is it was the duty of the court and counsel to utterly disregard it.

See statute quoted in brief J. K. Toole, p.
Pralus vs. Paufee G. & S. Mining Co., 35 California R.30.
Elder vs. Shaw, 12th Nevada, R. 78.
Caldwell vs. Galy, 5th Nevada, R. 258.
McWilliams vs. Huschman, 5th Nevada, R. 263.
Love vs. Surra, 32d California, R. 639.
Morrill vs. Chapman, 35 California, R. 85.
Sanchez vs. McMahan, 35 California, R. 218.
Vietæ vs. Bivens, 28 California, R. 409.
Wall vs. Preston, 25 California, R. 59.
Brady vs. O'Brien, 23 California, R. 244.
Huton vs. Reed, 25 California, R. 483.
Pactudye vs. San Francisco, 27 California, R. 415.
Fitch vs. Bunch, 30 California, R. 208.

As no question of the sufficiency of the evidence to support the verdict in respect to the matters suggested by coun-

sel in his brief could be considered by the court, it was not necessary that all or any of the evidence should have been inserted in the record. In fact it does not purport to contain all the evidence. See record, page 62.

Libby vs. Dallon, 1st Nevada, R. 23.
Bond vs. State, 2d Nevada, R. 265.
Howard vs. Whiter, 3d Nevada, R. 539.
Sherwood vs. Sessa, 5th Nevada, R. 349.
State vs Parsons, 7th Nevada, R. 58.

The statute of Montana applicable to the proposition under consideration will be found on page 94, laws of 1878:

"When the notice of motion designates as the grounds of the motion the insufficiency of the evidence to justify the verdict or other decision, the *statement shall specify the particulars in which such evidence is insufficient.* When the notice designates as the grounds of the motion errors of law arising at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. *If no such specifications be made, the statement shall be disregarded on the hearing of the motion.*"

Now as no such question could be considered by the court, it would have been its duty to strike out of the statement this or any other evidence of possession. The remainder of the foregoing section on this point is as follows:

"It is the duty of the judge or referee in settling the statement to strike out of it all redundant and useless matter. * *"

We think it useless to pursue this subject further, as the court will assume that the evidence is amply sufficient to support the findings, verdict and judgment.

I.

It is claimed that the deed from the probate judge, Truett, to Wau Lee, conveyed no title to him for the reason,

1st, that no patent had been issued to said probate judge at the time this deed was made. And

2d, because the said Wau Lee was a Chinaman.

Neither of these positions can be successfully maintained. They are important in this case, for if the deed from the probate judge to Wau Lee passed a title then the statute of limitations were set in motion upon McCann's entry into possession in 1869, and his actual occupancy to 1870. When his successor, plaintiff, took and held to 1873, the date of the second conveyance by the probate judge, would give her a complete title by adverse possession, leaving out of the case altogether her adverse possession as found by the jury up to October 4th, 1877, being over three years since the deed was made to Wau Lee.

Upon the *first* point we submit that the *cash entry* in the United States Land Office, and certificate given, which is surrendered for the patent, was all that was required to enable the probate judge to convey. This *entry*, as we have seen from the evidence of Mr. Moe, Register of the Land Office, at Helena, was made partly on the 2d of March, 1869, and the balance on September 14th, 1869. It was not necessary to await the slow process of obtaining a patent; the bare evidences of the *title* he acquired by the *entry*. The application of Wau Lee, who had a cabin upon this lot and was an occupant of it, is but one out of a great many, of the applications and deeds made before the emanation of the patent, and after the cash entry of the land by the probate judge, *i. e.* 501. But the Act of Congress refers especially to this entry, and not to the patent. The portion of it applicable is as follows:

"Whenever, etc. * * * it is lawful for the judge of the county court for the county in which the town is situated, to *enter* at the *proper land office* and at the minimum price the land so selected and occupied in trust for the several use and benefit of the *occupants* thereof according to their respective interests. The execution of *which trust* as to the *disposal of the lots of such town* and the proceeds of the sales thereof to be *conducted* under such *regulations* as may be prescribed by the legislative assembly of the state or territory in which the same may be situated."

By this it will be seen that the trust is created by the *entry* in the *land office*, and that the trust is in favor of the *occupants* of the *lots*, and that the *execution* of the *trust* in the *disposal* of the lots is to be regulated by the legislative assembly.

The legislative assembly of the Territory laws of 1864. See 5 and 6, page 61, is as follows:

Fourth session laws, page 61, sections 5 and 6.

"Immediately after such survey and plat has been made, or if a survey and plat has been made previous to the *entry*, according to the provisions of section three of this act, then immediately after the *entry* of these lands at the proper land office, as provided in first section of this act, the corporate authorities, or the probate judge, as the case may be, shall cause a notice to be published in all the newspapers, published in such town, or if no newspaper be published in such town, then by advertisements posted up in in twelve of the most public places in such town, for at least two months, giving notice of such *entry*, and requiring every claimant or claimants of any town lot or lots, to file in the office of such incorporate authorities, or probate judge as the case may be, a statement of his or their claims within two months from the date of the first publication of such notice."

Sec. 6. Such statements shall be made in writing, signed by the party or parties making the same, and verified by the affidavit of such party or parties, and shall be recorded at length in a well bound book to be provided and kept for such purpose by such incorporate authorities, or judge of probate, as the case may be. Such statement shall specify the grounds of such claim, particularly describing the lot or lots claimed, the date as near as may be of the occupation of said lor or lots, and by whom; what improvements have been made on said lot or lots and the value thereof; and that such lot or lots are now actually possessed and occupied by such claimant, or that the right to such occupation is in the claimant, if such lot or lots are occupied by another."

By reference to record, page 13, it will be seen from the evidence of A. J. Fisk that that the "notice of the entry of Helena town site was published in *Helena Herald* for sixty days, commencing March 9th, 1869."

As no objection was ever made to the deed of the probate judge to Wau Lee upon the grounds stated, defendants in error were not required to produce certified or sworn copies of the certificate of the entry on March 2d, 1869. It will therefore be conceded that the money was paid for the land and the certificate issued. It will be observed that the legislative assembly in prescribing the mode of disposing of these lots so held in trust by the probate judge by the *entry* in *the land office*, required Wau Lee to make his application and pay for his lot and get his deed just as he did. This objection was never made to the deed to Wau Lee, and while we do not think there is anything of merit in it, we insist that it ought not to be considered. If it had been properly made whatever was necessary to show a right to convey might then and there have been produced in evidence.

The second objection urged by counsel that Wau Lee, although an occupant of this lot, could not acquire title from the probate judge, is equally untenable. The Congress of the United States has a right to dispose of the public domain and if it chooses to make the only qualification to purchase a town lot depend upon his occupancy of it, we can see no reasonable objection to this policy. The term *occupant* has received a judicial construction in this connection, and in addition to the authorities and argument presented by our associate counsel in this case we cite the following:

Lechler vs. Chaplen, 12th Nevada, 65.
Eureka vs. Way, 11th Nevada, 171.

The legislative assembly may prescribe the manner of disposing of these lots, but it cannot curtail or enlarge the class of persons who may purchase them of the probate judge. Congress has not deemed it proper to attach to such qualifications the pre-requisite of citizenship in the sense

used in homestead, preemption, timber culture, desert and mineral entries.

It is clear that under the findings plaintiff was in the actual occupation and possession of the property at the time the deed was made by probate judge Hilger to Tanner, and that such deed on that account conveyed no title to him. The defendant in error is in such case entitled to recover on her prior possession, and right of possession as a beneficiary of the trust at that time. See record, p. 56, findings, 6, 7 and 16.

But we insist that her title was regularly acquired, and her right of possession complete at the time of the commencement of this action, and that she has not since lost any of her rights. The cash entry by Truett on the 2d of March, 1869, gave him a right to convey, and there can be no reason why the section of the statute of Montana quoted at top of page 8, of brief of plaintiff in error, does not apply. The deed made by him was in fee simple absolute. Upon receiving the patent neither himself or his successor could convey to anyone else, as it was held in trust for no other person. Her possession and right of possession by purchase and actual occupancy at the time the patent issued, invested the probate judge with a trust in her favor, unless his trust had already been extinguished by the conveyances theretofore made to her and her predecessors in interest, prior to the issuance of the patent.

III.

It is claimed that the deed to Wau Lee was not properly acknowledged, and that for this reason it conveyed no title to him. See brief of plaintiff in error, pages 8 and 9, and record, pages 12 and 13. First it will be seen that no such objection was made. See record page 13. It is too well settled to admit of controversy or require the citation of authorities, that to make this objection available it must have been made at the time the deed was offered, and it must also appear that the exception was entered in the minutes of the

court, taken down by the clerk at the time, or reduced to a bill of exceptions and signed by the judge during the trial. It is too late, thereafter, to urge such an objection.

Besides, under the statutes and decisions of the courts in Montana Territory the want of an acknowledgment does not invalidate the deed or defeat the operation of the transfer of title by it. The purpose of the acknowledgment is to entitle it to be recorded and thereby impart constructive notice under the recording act.

See Hatter vs. Taylor, 1st. Montana, p. 688.
See U. S. R. p.

It is also urged that deed from Lum Sing to McCann is void on account of the discrepancy in the date in the body of the deed and the acknowledgment to it. Whether this is a clerical error which has since crept into the record we are unable to say. If it existed in the original deed as introduced in evidence it is sufficient to know that the objection mentioned was not urged to it and no opportunity afforded to explain it. See record, pages 14 and 15. The objection reads as follows: "To the introduction of which defendant then and there objected. The court overruled the objection and the defendant then and there excepted. The said deed was then read in evidence."

Plaintiff also claims that on account of some imaginary defect in the deed from Wau Lee to Lum Sing, it is to be inferred that no such person as Wau Lee existed. The jury find that there was such person. See record, page 55, finding 1. The sufficiency of the testimony to support the finding as we have seen will not be considered. The statement nowhere alleges that the evidence upon this question was insufficient. It is therefore concluded by the special and general verdict. So as to the deed from McCann to defendant in error dated August 2d, 1870. See record, pages 17 and 18, and brief of plaintiff, bottom of page 9. It is claimed that it never was introduced in evidence. This is strange, indeed. It is a part of the statement purporting to contain the evidence, and is

one of the facts found by the jury. See record, pages 55 and 56, special findings, 3, 4 and 5. Now if this jury made this finding without the evidence to support it the insufficiency should have been pointed out in the statement. The attention of defendant in error should have been called to that point. It was not done, and even if this deed was eliminated from the record, these findings will be regarded as standing facts, and the court will assume that there was ample evidence to support them. (See statute and authorities cited on this point supra.)

IV.

There remains but one more question to be considered. It is found on 7th subdivision of brief of plaintiff in error, page 10.

It is here claimed that there could be no adverse possession in defendant in error until the conveyance by Probate Judge Hilger to Tanner on the 23d of February, A. D. 1873. And it is assumed that at this time the cabin and lot were vacant and unoccupied. In this counsel is mistaken. See evidence of Sweeney et al., record, pages 21 and 22. It was occupied by defendant in error. See also special finding, 6 and 7, record page 56. The jury also find that no open or notorious or adverse possession was taken by any one after defendant in error entered on the 2d of August, 1870, until Dunphy entered on Oct. 4th, 1877. This is the entry that occasioned this action.

Now if the evidence did not support these findings plaintiff in error should have moved on *that* account in the court in which the case was tried, to have them set aside. He did not see proper to allege in his statement that the evidence was insufficient to support these findings, or the general verdict, or the allegations in the complaint, in that no adverse possession was shown in defendant in error from August 2d, 1870, to October 4th, 1877. The evidence, therefore, to support these findings, verdict, alegations in the complaint and judgment could not properly be inserted in the statement, as

it could not be considered. The court as we have seen under the statute quoted in this argument, would have stricken it from the statement, had it been embraced in it. Leaving all else out of the case and we have the fact that defendant in error held adverse possession of this property for over three years after the execution of the deed to Tanner, concluded by the special findings. Record, p. 56, findings pages 5, 6, 7 and 16.

Besides this fact is alleged in the complaint and is denied in the answer; it is an issue made by the pleadings and consequently concluded by the general verdict. No objection or exception was taken to the submission of special findings to the jury. If it was necessary that the court should direct the submission of them, the presumptions are that it did so. Such presumption will always be indulged to uphold the judgment. To rebut this objections should have been made to the submission thereof to the jury, and an exception taken to the ruling if not satisfactory. Here no ruling was asked for or had. It is too late now for counsel to object to these findings. They are included in the statement and properly a part of this record as some of the proceedings had at the trial. The findings, as we have before stated, can only be impeached on account of the insufficiency of the evidence to support them. Plaintiff in error failed to designate in his statement wherein the evidence was insufficient, or which finding was not supported by the testimony. In such case the statute of Montana provides that the statement in that respect will be disregarded.

The supreme court of the Territory interpreting section 195, which is identical with section 287, quoted in this brief and now contained in the codified statutes, use the following language: "The requirements of section 195 of the code, wherein the mode of proceeding for a new trial is given, seem incapable of being misunderstood or misinterpreted. It is therein provided that the party intending to move for a new trial shall give notice to the adverse party, and that the notice shall designate generally the grounds upon which the

motion will be made, and that when the notice designates as the grounds upon which the motion will be made, the insufficiency of the evidence to justify the verdict or other decision the *statement* shall specify the *particulars* in which *such evidence* is *alleged* to be *insufficient*, and when the grounds of the motion are errors of law occurring at the trial and excepted to by the moving party the statements shall specify the particular errors on which the party will rely."

"The object of these requirements and the reasons why they are imposed upon the party moving for a new trial, is to notify the adverse party and the court of the *exact* error complained of, so that the evidence in the statement may be confined to the elucidation pro and con of matters complained of. This section does not contemplate that all the evidence produced on the trial shall be produced and contained in the statement, but only so much thereof as is applicable to maintain or defeat the questions raised on the appeal. The motion *must* designate and specify with exactness and precision the grounds upon which the motion will be made, and these specifications *must* be carried into the statement and made a part thereof, and only so much of the evidence shall be reproduced as tends to explain the specifications of errors. The cause on appeal is to be tried upon questions of law and fact, raised in the statement, and a statement that makes a general assignment of errors as to the law and facts calls upon the appelate court to form itself into a sort of investigating committee to hunt after possible errors in the hope that the court will find what the appellant has not been unable to do * * This court has no jurisdiction for any such purpose, and we must confine ourselves to the investigation of such alleged errors as are *specifically* raised in the statement.

"The specification of errors forms the frame work of the statement, and the evidence is only reproduced to support the statement and make it complete. The specification is not only necessary in order to direct the attention of the *court* to the *evidence that bears upon the error complained of*, but it is equally *necessary* to *enable* the *adverse party to sug-*